CALIFORNIA COASTAL COMMISSION
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CLAIM OF VESTED RIGHTS
STAFF REPORT AND RECOMMENDATION

CLAIM NO: 6-04-036-VRC **Wed 19**

CLAIMANT: CITY OF SAN DIEGO

PROJECT LOCATION: Immediately offshore of the La Jolla Beach & Tennis Club, between the western extensions of Paseo Dorado and Avenida De La Playa, seaward of 2000 Spindrift Drive, La Jolla, City of San Diego, San Diego County.

DEVELOPMENT CLAIMED: Designation of a public swim area and placement of buoy markers in the water every summer surrounding a portion of the designated swim.

FILE DOCUMENTS: Claim of Vested Rights Application dated 3/29/04; Letters from City of San Diego Attorney's Office dated 7/1/04 and 9/13/04.

SUMMARY OF STAFF RECOMMENDATION

Staff recommends **denial** of the claim of vested rights. The City of San Diego claims a vested right for designation of a swim area for the general public and for placement of buoy markers in the ocean by the La Jolla Beach and Tennis Club ("Beach Club") to mark a portion of a designated public swim area in front of the Beach Club. The area that is the subject of the vested rights claim are tidelands granted in trust by the legislature to the City of San Diego. Staff has reviewed all the evidence presented by the applicant as well as other evidence and has concluded that the claim of vested rights is not substantiated for three reasons:

1) the City has not demonstrated that the placement of the buoys in front of a private beach club was undertaken pursuant to a valid governmental authorization obtained prior to February 1, 1973;
2) the placement of the buoys was undertaken by the private beach club, and therefore the City cannot demonstrate that it relied in good faith on any valid government authorization obtained prior to February 1, 1973;
3) sufficient factual evidence was not provided to establish that the placement of buoys to mark off a much smaller area than the designated public swim area occurred consistently every year.
4) the City has not incurred substantial liabilities from the Club's placement of the buoys and will not incur any significant injury if it is necessary for the Club or the City to obtain a coastal development permit for any future placement of the buoys.

Staff also notes that State Lands Commission staff have submitted a letter in support of the staff's recommendation. For these reasons, staff recommends that the Commission find that the City of San Diego has not met its burden of establishing its claim of vested rights.

I. Commission Action

Staff Recommendation for Denial of Claim: Pursuant to California Code of Regulations, Title 14 (14 CCR), section 13203, the Executive Director has made an initial determination that the instant Claim of Vested Rights (Coastal Commission file number 6-04-036-VRC) has not been substantiated. Staff therefore recommends that the claim be rejected.

Motion: *"I move that the Commission determine that Claim of Vested Rights 6-04-036-VRC is substantiated and that the development described in the claim does not require a Coastal Development Permit."*

Staff recommends a **NO** vote. Failure of the motion will result in a determination by the Commission that the development described in the claim requires a Coastal Development Permit and in the adoption of the resolution and findings set forth below. The motion passes only by an affirmative vote of a majority of the Commissioners present.

Resolution for Denial of Claim:

The Commission hereby determines that Claim of Vested Rights 6-04-036-VRC is not substantiated and adopts the Findings set forth below.

II. Findings and Declarations

The Commission finds and declares as follows:

A. Legal Authority and Standard of Review

1. Basic Statutory Provisions

California Public Resources Code ("PRC") section 30600(a)[1] provides, in relevant part:

". . . in addition to obtaining any other permit required by law from any local government or from any state, regional, or local agency, any person, as defined in Section 21066, wishing to perform or undertake any development in the coastal zone . . . shall obtain a coastal development permit.

The term "person" is defined in PRC section 21066 to include cities, towns, "and any of the agencies and political subdivisions of those entities."

[1] All references to PRC sections in the 30,000's are to the California Coastal Act.

The Coastal Act defines "development," in PRC section 30106, to include the following:

> *"on land, in or under water, the placement or erection of any solid material or structure; . . . grading, removing, dredging, mining, or extraction of any materials; change in the density or intensity of use of land . . . ; change in the intensity of use of water, or of access thereto; construction, reconstruction, demolition, or alteration of the size of any structure, ..."*

One exception to the general requirement that one obtain a coastal development before undertaking development within the Coastal Zone is provided by the **Vested Rights section of the Coastal Act, PRC section 30608**, which provides as follows:

> *"No person who has obtained a vested right in a development prior to the effective date of this division [the Coastal Act] or who has obtained a permit from the California Coastal Zone Conservation Commission pursuant to the California Coastal Act of 1972 (commenting with [PRC] Section 27000) shall be required to secure approval for the development pursuant to this division; provided, however, that no substantial change may be made in any such development without prior approval having been obtained under this division."*

The effective date of the division, i.e., the Coastal Act, is January 1, 1976. The subject site was also subject to the permitting requirements of the Coastal Act's predecessor statute, the Coastal Zone Conservation Act of 1972 (aka Proposition 20, "the Coastal Initiative"), which went into effect on February 1, 1973. The Coastal Zone Conservation Act required a coastal development permit for new development on this site occurring after February 1, 1973. Thus, the critical date for evaluating this Claim of Vested Rights is February 1, 1973 and this will be referred to as the effective date of the Coastal Act for this site.

Pursuant to Section 30608, if the City obtained a vested right in a development on the subject site prior to February 1, 1973, no coastal development permit (CDP) is required for that development. However, no substantial change in the exempted development may be made until obtaining either a coastal development permit or other approval pursuant to another provision of the Coastal Act.

2. Procedural Framework

The procedural framework for Commission consideration of a claim of vested rights is found in 14 CCR sections 13200 through 13208.[2] These regulations require Commission staff to prepare a written recommendation for the Commission and require the Commission to determine, after a public hearing, whether to acknowledge or deny the claim or to continue the matter to allow for the submission of further evidence. 14 CCR §§ 13203 & 13205. If the Commission finds that the claimant has a vested right for a specific development or development activity, then the claimant is exempt from Coastal Development Permit requirements for that specific development only. Any changes to the exempt development after February 1, 1973 will require a CDP. If the Commission finds that the claimant does not have a vested right for the particular development, then a CDP must

[2] All references to 14 CCR sections are to the Commission's administrative regulations.

be obtained to authorize the development or, if a CDP is not obtained, then the development is not authorized under Coastal Act. 14 CCR § 13207. If a CDP is not obtained, then the development is subject to enforcement action under the Coastal Act to compel its removal.

3. Standard of Review

PRC section 30608 provides an exemption from the permit requirements of the Coastal Act for, among others, any "person who has obtained a vested right in a development prior to …[February 1, 1973] . . .," but neither the Coastal Act nor the Commission's regulations articulate any standard for determining whether a person has obtained such a right. Thus, to determine whether the Coastal Act's vested rights exemption applies, the Commission relies on the criteria for acquisition of vested rights as developed in the case law applying the Coastal Act's vested right provision, as well as in common law vested rights jurisprudence. That case law is discussed below.

"'"The vested rights theory is predicated upon estoppel of the governing body."'" *Raley v. California Tahoe Regional Planning Agency* (1977), 68 Cal.App.3d 965, 977.[3] Equitable estoppel may be applied against the government only where the injustice that would result from a failure to estop the government "is of sufficient dimension to justify any effect upon public interest or policy" that would result from the estoppel. *Raley*, 68 Cal.App.3d at 975.[4] Thus, the standard for determining the validity of a claim of vested rights requires a weighing of the injury to the regulated party from the regulation against the environmental impacts of the project. *Raley*, 68 Cal.App.3d at 976.

The seminal decision regarding vested rights under the Coastal Act is *Avco Community Developers, Inc. v. South Coast Regional Commission* (1976) 17 Cal.3d 785. In *Avco,* California Supreme Court recognized the long-standing rule in California that if a property owner has performed substantial work and incurred substantial liabilities in good faith reliance upon a permit issued by the government, he acquires a vested right to complete a construction in accordance with the terms of the permit. The court contrasted the affirmative approval of the proposed project by the granting of a permit with the existence of a zoning classification pertaining to the property, which would allow the type of land use involved in the proposed project. The court stated it is beyond question that a landowner has no vested right in existing or anticipated zoning. *Avco, supra,* at 796; *accord, Oceanic Calif., Inc. v. North Central Coast Regional Com.* (1976) 63 Cal.App.3d 357.

The acquisition of a vested right to continue an activity without complying with a change in the law thus depends on good faith reliance by the claimant on a governmental representation that the project is fully approved and legal. If the claimant can thereafter estop the government from applying a change in the law to his project, and from denying that it had in fact approved his project, then the scope of the vested right must be limited by the scope of the governmental representation on which the claimant relied, and which constitutes the basis of the estoppel. In other words, one cannot rely on an approval that has not been given, nor can one estop the government from applying a change in the law to, or from denying that it has approved a project it

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[3] quoting Spindler Realty Corp. v. Monning, 243 Cal.App.2d 255, 269, quoting Anderson v. City Council, 229 Cal.App.2d 79, 89.

[4] quoting City of Long Beach v. Mansell, 3 Cal.3d 462, 496-97.

has not in fact approved. Therefore, the extent of the vested right is determined by the terms and conditions of the permit or approval on which the owner relied before the law, which governs his project, was changed. *Avco Community Developers, inc. v. South Coast Regional Commission, supra*, 17 Cal.3d 785.

The early vested rights cases involving the Commission (or its predecessor agency) dealt mostly with the subdivision of land and/or the construction of physical structures on land. The courts focused primarily on whether the developers had acquired all of the necessary government approvals for the work in which they claimed a vested right, satisfied all of the conditions of those permits, and had begun their development before the Coastal Act (or its predecessor) took effect.[5] The frequently cited standard for establishing a vested right was that the claimant had to have "performed substantial work and incurred substantial liabilities in good faith reliance upon a permit issued by the government" in order to acquire a vested right to complete such construction. Avco Community Developers, Inc. v. South Coast Regional Commission (1976), 17 Cal.3d 785, 791.

Beginning in the mid 1980's, a series of cases arose involving claims of vested rights with respect to industrial operations.[6] These cases applied the Avco rule in that they relied primarily on whether the necessary permits had been issued and whether the claimants had acted in good faith reliance on governmental representations to their detriment.

However, the Commission is aware of no case law involving a municipal agency asserting that it has acquired a vested right to engage in a specific method of managing public lands that would normally be subject to a requirement for a permit from a state agency. Perhaps the most significant differences between this situation and the ones discussed in the case law cited herein are that the City is not a for-profit business that has invested funds in its annual activities in order to generate a profit, and the activities involved here truly are limited to the management of lands, rather than the running of a business.

Because the Commission is aware of no clearly applicable precedent for this scenario, in determining whether the City has acquired a vested right for the claimed development, the Commission will apply the generally accepted legal criteria to determine whether a claimant has a vested right for a specific development, informed by the legal underpinnings of the vested rights doctrine as a manifestation of the doctrine of equitable estoppel. These criteria are based on the terms of the Coastal Act and case law interpreting the Coastal Act's vested right provisions, as well as common law vested rights claims. The standard of review for determining the validity of a claim of vested rights is summarized as follows:

1. The claimed development must have received all applicable governmental approvals needed to undertake the development prior to February 1, 1973. Typically this would be a permit or

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[5] See, e.g., Patterson v. Central Coast Regional Comm'n (1976), 58 Cal. App. 3d. 833; Avco Community Developers, Inc. v. South Coast Regional Comm'n, 17 Cal.3d 785; Tosh v. California Coastal Comm'n (1979) 99 Cal.App.3d 388; Billings v. California Coastal Comm'n (1980) 103 Cal.App.3d 729.

[6] See Halaco Eng'g Co. v. South Central Coast Regional Comm'n (1986), 42 Cal. 3d 52 (metal recycling); Monterey Sand Co., Inc. v. California Coastal Comm'n (1987), 191 Cal. App. 3d 169 (sand dredging); Hansen Bros. Enter. v. Board of Supervisors of Nevada County (1996), 12 Cal. 4th 533 (gravel mining and rock quarrying).

other legal authorization or evidence that no permit or other legal authorization was required for the claimed development. (*Billings v. California Coastal Commission* (1988) 103 Cal.App.3d at 729).

2. The claimant must have performed substantial work and/or incurred substantial liabilities in good faith reliance on the governmental authorization received prior to February 1, 1973. (*Tosh v. California Coastal Commission* (1979) 99 Cal.App.3d 388, 393; *Avco Community Developers, Inc. v. South Coast Regional Commission* (1976) 17 Cal.3d 785). The claimant must be able to show that it could suffer a monetary injury from being subjected to additional regulation that it legitimately did not anticipate when it made its investment. The Commission must weigh the injury to the regulated party from the regulation against the environmental impacts of the project and ask whether such injustice would result from denial of the City's vested rights claim as to justify the impacts of the activity upon Coastal Act policies. (*Raley*, *supra*, 68 Cal.App.3d at 975-76.

There is also legal authority that suggests that there are two additional, applicable criteria that should be considered in determining whether a particular claim for an assertion of a vested right to complete a development can be acknowledged. The first is the holding that only the person who obtained the original permits or other governmental authorization and performed substantial work in reliance thereon has standing to make a vested right claim. (*Urban Renewal Agency v. California Coastal Zone Conservation Commissio*n (1975) 15 Cal.3d 577). The other criteria to consider is whether in making an application for a Coastal Development Permit, the claimant relinquishes any right to make a subsequent vested rights claim for the same project.

Accordingly, in order to acknowledge a claim of vested right for a specific development, the Commission must find that the claimant met all applicable permit requirements for the project and, at a minimum, performed substantial work and/or incurred substantial liabilities in good faith reliance on the permits or approvals that were granted prior to February 1, 1973. In addition, the claimant must not have subsequently relinquished any right to make the vested rights claim. Finally, no substantial change in the development that is the subject of the claim can occur without the claimant obtaining a coastal development permit.

The burden of proof is on the claimant to substantiate the claim of vested right. (14 CCR § 13200). If there are any doubts regarding the meaning or extent of the vested rights exemption, they should be resolved against the person seeking the exemption. *(Urban Renewal Agency v. California Coastal Zone Conservation Commission* (1975) 15 Cal.3d 577, 588).

A narrow, as opposed to expansive, view of vested rights should be adopted to avoid seriously impairing the government's right to control land use policy. *(Charles A. Pratt Construction Co. v. California Coastal Commission* (1982) 128 Cal.App.3d 830, 844, *citing, Avco v. South Coast Regional Commission* (1976) 17 Cal.3d 785, 797). In evaluating a claimed vested right to maintain a nonconforming use (i.e., a use that fails to conform to current zoning), courts have stated that it is appropriate to "follow a strict policy against extension or expansion of those uses." *Hansen Bros. Enterprises v. Board of Supervisors* (1996)12 Cal.4th 533, 568; *County of San Diego v. McClurken* (1957) 37 Cal.2d 683, 687).

The following vested rights analysis is based on information submitted by the claimant and supplemental Commission staff research or official Commission and County records.

B. Background Regarding Claim

The area subject to the vested rights claim is an area of the ocean located seaward of the La Jolla Beach and Tennis Club in the La Jolla community of the City of San Diego. The La Jolla Beach and Tennis Club is a private beachfront club/resort situated on an 18.18 acre parcel of land which retains ownership of the beach up to the Mean High Tide Line (MHTL). The areas seaward of the MHTL are tidelands held in trust for the public. The subject site is along a stretch of shoreline commonly called "La Jolla Shores". North of the site is a public beach, improved boardwalk, lifeguard station, large grassy picnic areas and several other amenities including public restrooms/showers and children's playground. The public beach extends north all the way to Black's Beach and south to a point just south of the restaurant, "The Marine Room" which is located just south of the La Jolla Beach and Tennis Club. The boat launch is located at the street end of Avenida de la Playa, the street which marks the northern boundary of the La Jolla Beach and Tennis Club property. Intermittent lateral public access is available along the shoreline dependent on the tide conditions, especially at the southern and northern ends where it is near tidepools, rock outcroppings and coastal bluffs. The ocean area of the designated swim area extends seaward of the MHTL. (ref. Exhibit #2).

The subject claim of vested rights was submitted in March 2004 by the City of San Diego Fire-Rescue Department/Lifeguard Services Division to: 1) designate a swim area for the general public in the ocean (seaward of the La Jolla Beach and Tennis Club) and, 2) place buoy markers to mark a portion of the designated swimming area. According to the City, the bathing and swimming zone was designated in March of 1966. Pursuant to City of San Diego Resolution No. 186513 (ref. Exhibit #4), the bathing and swimming zone was described as the beach and waters extending between Avenida de la Playa and 45 ft. north of Roseland Drive in La Jolla. No western limit of the swim area was established. Subsequently, in 1994, the westerly boundary of this swim area was designated as extending l,000 feet seaward of the mean high tide line (MHTL) pursuant to Ordinance No. 0-18073.

According to the City, at least since 1966 when the swim area was designated by the City Council resolution, a string of marker buoys have been placed in the water each summer to mark a safe swim area. Notably, the City, without explanation, acknowledges that the buoys mark off a much smaller swim area than the designated public swim area. (ref. Exhibit #2). The City also acknowledges that it was not City lifeguards or other City personnel who placed the buoys, but that instead the buoys were placed by employees and/or agents of the adjacent La Jolla Beach and Tennis Club. Even though the buoys mark off a much smaller swim area than the designated public swim area and are only placed by the private beach club over the portion of the designated public swim area in front of the Beach Club, the City believes that demarcation of this swim area with buoy markers is important due to the fact that a public boat launch exists further north at the northern edge of the swim area (at the terminus of Avenida de la Playa). The boat launch is at the westerly terminus of Avenida de la Playa, the street that forms the northern boundary of the La Jolla Beach and Tennis Club. According to the City, the purpose of the buoy markers is to keep boats out of the swimming area in order to ensure public safety of the people swimming in that area.. The

buoy markers are placed at the beginning of Memorial Day weekend and removed after Labor Day each year. As shown in an exhibit submitted by the City, the buoy markers are placed in a semi-rectangular fashion in the water and they mark off a much smaller swim area than the designated public swimming area (ref. Exhibit #2). The buoy markers are plastic-coated foam markers that float in the water at approximately ten foot intervals connected by a nylon rope which is anchored with chains connected to cement blocks. Two cement blocks are dropped offshore approximately 50-70 feet seaward of the Mean High Tide Line. One block anchors the beginning of the northern side of the swim area and the other marks the southern side of the swim area. From each of the blocks, the buoy marker line is extended seaward about 300 feet where the line is anchored again and where the westerly boundary is formed joining the northern and southern boundary lines (ref. Exhibit #2).

C. Evidence Presented by Claimant

The City of San Diego submitted a vested rights application form with numerous exhibits (ref. Exhibit #2), including maps showing the public swimming area and swim buoy line. The City also submitted two letters from the City of San Diego's attorney dated July 1, 2004 and September 13, 2004 (ref. Exhibit #3) further explaining the claim of vested rights. The information submitted by the City includes various resolutions/ordinances to establish that the City acted formally and properly to establish the swim area designation subject to this review. In addition, to support the City's claim that the marker buoys were placed every summer, the City provided declarations from several individuals. The declarations, which are attached as Exhibit #5, are summarized below:

Declaration of William Owen – Mr. Owen executed a declaration dated 3/10/04 stating that from 1967 through 1988 he was employed by the City as a sergeant in the lifeguard division. He states that his area of responsibility included La Jolla shores beach and swim area. He further indicates that he patrolled the public swimming area, designated by the City of San Diego, located adjacent to the ocean beach in front of the La Jolla Beach & Tennis Club. He further states that every year since 1959 and each year during his employment as a lifeguard at La Jolla Shores, that the swimming area buoys marking the City-designated swim area in front of the Beach Club were installed just before Memorial Day and removed just after Labor Day and maintained continuously through the summer months. He states that the swim buoys were placed in approximately the same configuration each year. He states that during the summer of 2002 he visited the swim area and the buoys were in approximately the same configuration and location during the years that he was a lifeguard in that area. Lastly, he states that he and his fellow lifeguards relied on the swim buoys to help them meet their swim area management responsibilities for public safety including keeping the recreational boaters and surfers out of the swim area due to the close proximity of the public boat launch to the swim area.

Declaration of Lorin D. "Buster" Mico – Mr. Mico executed a declaration dated 3/6/04 stating from 1956 through 1988 he was employed by the City in the Marine Safety Division. He was subsequently promoted to lieutenant lifeguard and he supervised ocean beaches and swimming areas including La Jolla Shores beach and swim areas as well as other San Diego beaches. He further states that he patrolled the public swimming area, designated by the City of san Diego, adjacent to the ocean beach in front of the La Jolla Beach and Tennis Club. Throughout the period of his employment he observed on a regular basis the features of that swimming area. He further

states that every year during his employment as a lifeguard at La Jolla Shores, that the swimming area buoys marking the City-designated swim area in front of the Beach Club were installed just before Memorial Day and removed just after Labor Day and maintained continuously through the summer months. He states that the swim buoys were placed in approximately the same configuration each year. He states that during the summer of 2002 he visited the swim area and the buoys were in approximately the same configuration and location during the years that he was a lifeguard in that area. Lastly, he states that he and his fellow lifeguards relied on the swim buoys to help them meet their swim area management responsibilities for public safety including keeping the recreational boaters and surfers out of the swim area due to the close proximity of the public boat launch to the swim area.

Declaration of Lorin D. "Buster" Mico – Mr. Mico executed a second declaration dated 9/2/04. This second declaration is nearly identical to the first one with the exception that there is a discrepancy in the years he worked for the City and the duration which he served in the capacity as a Lt. Lifeguard. In addition, the second declaration contains additional information regarding his contacts with Beach Club members. In the declaration he indicates that from the years 1956 through 1988 he was employed by the City of San Diego as a Lt. Lifeguard to ocean beaches and swimming areas. Before 1973, Mr. Mico indicates that he frequently consulted with the Beach Club member William Scripps Kellogg and Beach Club employee Fritz Fehrenson regarding a range of beach management issues which included the placement of the buoys marking the portion of the City-designated public swimming area in front of the Beach Club. He further states that from 1973 through 1979, he continued to consult with Beach Club personnel William Crown Kellogg and his son, Robert Penfield Kellogg about a range of beach management issues. Lastly, he indicates that after 1979 and until his retirement in 1988, he continued to interact on these issue with William J. Kellogg and the Beach Club's General Manager, Mac Brewer.

Declaration of Lt. John Greenhalgh – Mr. Greenhalgh executed a declaration dated 7/1/04 stating that he is currently employed by the City of San Diego Fire and Life Safety Services as a lifeguard Lieutenant. He also states he has worked as a lifeguard for over 24 years, i.e. since approximately 1980. He states his current duties include supervising the La Jolla District involving handling the district budget, personnel, etc. He further states that in his capacity as a Lifeguard Lieutenant he also patrols the public swimming areas, designated by the City of San Diego, one of which was located next to the ocean beach in front of the La Jolla Beach and Tennis Club. He states that during his employment he has been in a position to and has observed on a regular basis the features of that swimming area. He further states that every year during his employment as a lifeguard at La Jolla Shores, that the swimming area buoys marking the City-designated swim area in front of the Beach club were installed just before Memorial Day and removed just after Labor Day and maintained continuously through the summer months. He states that the swim buoys were always placed in approximately the same configuration. He further states that for safety purposes, these buoys have been placed by the La Jolla Beach and Tennis Club with the approval and consent of the San Diego lifeguards. He states that during the summer of 2002 he visited the swim area and the buoys were in approximately the same configuration and location during the years that he was a lifeguard in that area. Lastly, he states that he and his fellow lifeguards relied on the swim buoys to help them meet their swim area management responsibilities for public safety including keeping the recreational boaters, kayakers and surfers out of the designated swim area in accordance with the City's rules applicable to designated swim areas.

Declaration of William J. Kellogg – Mr. Kellogg executed a declaration dated 9/2/04 stating that he has served as President of the La Jolla Beach and Tennis Club, Inc. and General Manager of La Jolla Beach & Tennis Club Partners L.P. He states that in this capacity, he was responsible to the Club's Board of Directors for all Beach Club management issues. He states that his father, William Crowe Kellogg held these same roles from 1987 to 1989. From 1973 to 1987 William Kellogg was the Managing Trustee of two trusts (the entities that preceded La Jolla Beach & Tennis Club Partners L.P.) that owned and operated the La Jolla Beach & Tennis Club. He further states that from 1940 to 1974, his grandfather, William Scripps Kellogg, was the managing Trustee of the trusts. He also states that his brother, Robert Penfield Kellogg, was an employee of the La Jolla Beach & Tennis Club and assisted his father with beach management from 1974 to 1994. William Kellogg also states he assisted both his father and brother with beach management from 1979 to 1989 as an employee of the La Jolla Beach & Tennis Club. Mr. Kellogg goes on to state that based on conversations with his brother, father and grandfather, he was informed that swimming buoys marking the City-designated swim area in from the Beach Club were installed during the summer every year since 1966 with the exception of the year 2003 when the City of San Diego and the Beach Club were under order by the California Coastal Commission not to place the swim buoys. He also states that the swim buoy lines and their anchors were typically placed by the Beach Club employees, but that the City lifeguards also occasionally assisted in the placement of the buoys by providing boats needed to float the anchors to their drop spots. Mr. Kellogg also states that since 1966, the swim buoy markers were placed with the knowledge and consent of the City lifeguards. He indicates he worked with Lt. Loren T. Mico as the principal point of contact from the 1960's through 1988 when Lt. Mico retired. After that, other lifeguards have worked with him and other Beach Club employees (John Campbell and Bud Stevens). Most recently his principal point of contact has been Lt. John Greenhalgh.

The City has also submitted several copies of local ordinances that were adopted related to beach areas and activities therein (ref. Exhibit #4)

D. Analysis of Claim of Vested Rights

The submitted claim includes designation of a public swim area and placement of buoy markers in the water every summer in front of a private club. The Commission does not object to the ordinance designating the swim area, and accordingly, the analysis below focuses on the claim of a vested right in the continued annual placement of the buoys.

1. The City Has Not Demonstrated That the Placement of the Buoys in Front of a Private Beach Club was Undertaken Pursuant to a Valid Governmental Authorization Obtained Prior to February 1, 1973

The marker buoys subject to this claim are placed seaward of the MHTL adjacent to the beach in La Jolla. Thus, the buoys are placed in State Tidelands, which in this particular case, are granted in trust by the legislature to the City of San Diego pursuant to Chapter 937, Statute of 1931, as amended (ref. Exhibit #6). Accordingly, title to these tidelands, and the revenues derived therefrom, are held by the City of San Diego in trust for the benefit of the citizens of California. In addition, when the State grants tideland property to a municipality accompanied by a delegation of

the right to manage the specified area for particular purposes and to exercise control over facilities located therein, the lands remain subject to State supervision. The local government grantee receives neither an exclusive nor an irrevocable interest but rather becomes the holder of property subject to a trust which must be exercised for the benefit of the public. The State may alter the contractual or property rights acquired by a city in further administration of the affected lands. (*Mallon v. City of Long Beach* (1955) 44 Cal.2d 199, 208-209.) After the grant has been made, the State has a continuing duty to protect the interests of the public. No grant of lands covered by navigable waters can be made which will impair the power of a subsequent Legislature to amend or modify the trust in a manner most suitable to the needs of the people of California. The State is the representative of all the people and all the people are the beneficiaries of the basic trust. (*City of Coronado v. San Diego Unified Port District* (1964) 227 Cal.App.2d 455, 474.)

When the tidelands area that is the subject of the vested rights claim was included within the coastal zone under the Coastal Act of 1972 and the Coastal Act of 1976, the manner in which development activity could occur in the tidelands was significantly affected. The coastal permit requirements of the 1972 Initiative and the 1976 Act in effect amended the grant of the public trust lands to the City. (*People ex rel. San Francisco Bay Conservation & Development Com. v. Town of Emeryville* (1968) 69 Cal.2d 533, 549.) Since February 1973, coastal permits have been required for activities which constitute a development under the Coastal Act. Here, the placement of buoys and the designation of a swim area, even though temporary, is development under section 30106 of the Coastal Act because it changes the access to and use of the tidelands during the period of installation.

The City has indicated that based on the individual declarations submitted, the buoys were placed by the La Jolla Beach and Tennis Club. However, the City has not provided any information regarding a lease, permit or other formal actions authorizing the Club to place the buoys. In addition, Commission staff contacted the State Lands Commission (SLC) with regard to the subject vested rights claim. SLC indicated to Commission staff that they had contacted the City of San Diego by letter dated 9/20/01, prior to the City's claim of vested rights, regarding the placement of buoys in the ocean (ref. Exhibit #7). In that letter it was stated that the SLC was aware that certain buoys have been placed in the water seaward of the mean high tide line near the La Jolla Beach and Tennis club. In the cited letter, SLC asked the City for information as to what arrangements the City has with the La Jolla Beach and Tennis Club for the operation of the buoys in the water seaward of the mean high tide line near the La Jolla Beach and Tennis club. Pursuant to a telephone call between Commission staff and SLC staff on 10/18/04, as well as in an October 21, 2004 letter to Commission staff, the State Lands Commission confirmed that the City has not responded to their letter.

Regarding the October 21, 2004 letter received by Commission staff from State Lands raising questions about whether the buoys on public tidelands have ever received proper authorizations, the letter stated, in part:

> "As the Legislature's delegated trustee of these tidelands, the City has the primary responsibility and authority to manage these lands on a day-to-day basis. The City of San Diego should not allow installation of improvements on trust lands, without formal City approval. This could be accomplished through the issuance of a lease or permit for the

> placement of buoys. Therefore, we believe that before there could be any vested rights claim, the City must have taken formal action to authorize the placement of these buoys."

The October 21, 2004 State Lands Commission letter confirms that the City has not demonstrated that it has ever taken any formal action to authorize/permit the La Jolla Beach and Tennis Club to install structures (i.e., placement of buoys, ropes, etc.) in the ocean on state tidelands at the subject site. The City instead indicates in their July 1, 2004 letter to Commission staff that the City's authority to allow placement of buoys or other markers to designate the swim area is addressed in Ordinance No. 3727 which states that specific activities are unlawful "on or upon water where warning signals have been placed". In addition, Ordinance No. 3727 gives the City Park and Recreation Department "jurisdiction, possession and control of all beach areas within the City and grants them the responsibility for the control and management of the beach areas and recreational activities thereon." The City further asserts that Ordinance No. 3727 also gives the Park and Recreation Department the duty to enforce the provisions of the ordinance.

However, the Ordinance does not specifically allow for the placement of marker buoys in the water in front of a private club to mark off safe swimming areas nor did the City take an action authorizing such placement. Section 2 of Ordinance No. 3727 states that the Park and Recreation Department "shall have jurisdiction, possession and control of all beach areas within the limits of the City," but it does not specifically authorize any given activity to be performed in exercising that control. Similarly, section 16 of Ordinance No. 3727 states that the ordinance does not "prevent any employee of the Park and Recreation Department … from doing anything … necessary and proper for the maintenance, improvement or betterment of [the designated] beach areas." However, it does not provide any new authority. Although the City may have had the ability to designate a public swim area, such an ability is not tantamount to an actual authorization to demarcate or develop the tidal area in a manner that would otherwise require a coastal development permit. Moreover, even if these sections of Ordinance No. 3727 could be construed to allow the City to demarcate the designated public swim area, they certainly would not authorize the demarcation of a much smaller swim area by placing buoys in front of the private Beach Club, thereby carving off an exclusive portion of a larger public area.

To establish a vested right, the City must show that it had all necessary government authorizations. (*J.D. Patterson v. Central Coast Regional Coastal Zone Conservation Commission* (1976) 58 Cal.App.3d 833, 844, *citing, People v. County of Kern* (1974) 39 Cal.App.3d 830, 838) (unless owner possesses *all* necessary permits, the mere expenditure of funds or commencement of construction does not vest any rights in the development). The scope of the vested right must be limited by the scope of the governmental representation on which the claimant relies, and which constitutes the basis of the estoppel. In other words, one cannot rely on an approval that has not been given. Therefore, the extent of the vested right is determined by the terms and conditions of the permit or approval on which the owner relied. See *Avco Community Developers, inc. v. South Coast Regional Commission, supra*, 17 Cal.3d 785.

According to the SLC, any kind of fixture within granted tidelands, including buoys, can only be done by formal action of the City. According to the SLC, a vested right against the trustee cannot occur unless the City has given the applicant a lease or a permit or a license or taken some type of formal action by the City Council which expressly gives permission to place such objects in the surf

zone. This means that the City Lifeguard Service, the City Park and Recreational Department and the La Jolla Beach and Tennis Club did not, prior to February 1, 1973, and still do not have express permission to legally place any structure in the ocean. Only by action of the City Council can such rights be legally authorized.

Therefore, because the City has not ever taken any type of formal action expressly granting permission to the La Jolla Beach and Tennis, the City Lifeguard Service or the City Park and Recreation Department to place buoy markers in the ocean, and State Lands staff have confirmed that such formal City approval is needed, the Commission finds that the City of San Diego cannot establish that it has a vested right for placement of the buoys in the water at this location as their placement has never been "legally" authorized.

2. Even if the City Had Demonstrated that the Placement of the Buoys was Undertaken Pursuant to a Valid Governmental Authorization Obtained Prior to February 1, 1973, the Placement of the Buoys in the Tidelands was Undertaken by a 3rd Party and was Therefore Not Undertaken by the City in Good Faith Reliance on any Valid Government Authorization Obtained Prior to February 1, 1973

As noted above, the placement of the buoys each summer is not conducted by the City, but instead the buoys are placed by employees/agents of the La Jolla Beach and Tennis Club, a private resort located adjacent to the site where the buoys are placed. In its review of the applicant's claim, Commission staff asked the City to address placement of the buoys by the Beach Club. Specifically, in an April 5, 2004 non-filing letter from Commission staff to the City, the question was raised as follows:

> Both declarations state that the buoys were installed, but they do not state by whom. The City's application indicates that it was the Club that traditionally placed the buoys. However, it is the city that is now applying for the vested right determination. Please provide information regarding what individual(s) or entity(ies) actually placed the buoys in the water each year? For any year during which the buoys were placed by an entity other than the city or an individual not working for and acting on behalf of the city, please provide information that documents the relationship that may have existed between that entity or individual and the city.

The City did not provide any information in response to the Commission's non-filing letter other than individual declarations indicating that the buoys were placed by the private Beach Club.

As noted above, the "acquisition of a vested right is grounded on equitable principles of estoppel." *Aries Dev. Co. v. California Zone Conservation Com., supra*, 48 Cal.App.3d at 548; *Spindler Realty Corp. v. Monning, supra*, 243 Cal.App.2d at 269; *Anderson v. City Council*, 229 Cal.App.2d 79, 89 (1964). That is, once the government represents to an applicant that his project is fully approved, and the applicant thereafter acts in reliance on that approval by incurring substantial liabilities or performing substantial construction, the applicant is in a position to estop the government from applying any subsequent change in the law to the project so as to render it illegal. *Aries, supra*, at 548.

By the same token, the exemption conferred by section 30608 of the Coastal Act is limited by its terms to a "person who has obtained a vested right to undertake the development." In other words,

> "…the exemption extends only to those persons whose reliance upon existing permits or authorization induced them to initiate substantial performance of their projects and to incur substantial liabilities in connection therewith." *Urban Renewal Agency v. California Coastal Zone Com., supra,* 15 Cal.3d 577, 586 (interpreting Pub. Res. Code § 27404, an exemption provision substantially similar to § 30608).

Specifically, in *Urban Renewal*, the Supreme Court upheld the trial court's ruling that plaintiffs had acquired a vested right as to the portions of the project they intended to complete, but found no readily observable authority in an exemption provision substantially similar to § 30608 "for expanding the exemption of one person to afford an exemption to another person who has not himself acquired vested rights." *Urban Renewal, supra,* 15 Cal.3d at 586. The court reasoned that "the exemption extends only to those persons whose reliance upon existing permits or authorization induced them to initiate substantial performance of their projects and to incur substantial liabilities in connection therewith." *Id.*

Applying this rule to the subject claim, since the acquisition of a vested right is based on estoppel, only the person who acted in reliance on a governmental approval and is thus in a position to estop a revocation of the approval may claim that his reliance has ripened into a vested right. As acknowledged by the materials in support of the vested rights claim, it is the private Beach Club, rather than the City, that has purportedly been placing the buoys in the tidelands in front of the private Beach Club. Therefore, it is the Beach Club that could potentially have a vested right to the placement of the buoys, not the City. The City cannot acquire a vested right based on the Beach Club's actions.

3. Even if the City had Demonstrated that the Placement of the Buoys was Specifically Authorized by a Valid Governmental Authorization Obtained Prior to February 1, 1973, Sufficient Factual Evidence Was Not Provided to Establish a Vested Right for the Placement of Buoys to Mark Off a much Smaller Swim Area than the Designated Public Swim Area, Especially Given that the Effect of Only Placing the Buoys Over the Portion of the Designated Public Swim Area in front of the Beach Club is to Convey the Perception that the Tidal Area Marked by the Buoys is a Private Swim Area

The factual evidence provided in support of City of San Diego's claim of vested rights for placement of the buoys is too general to enable the Commission to acknowledge a vested right for the practice of placing buoys in the tidelands to mark off a much smaller swim area with the buoys than the designated public swim area and to only place the buoys over the portion of the designated public swim area in front of the private Beach Club. While Commission staff requested that the City provide pictures, aerial photographs, work orders, log book entries, etc. in specific support of its claim, the City has not provided any such evidence. Instead, to support their claim of vested rights the City has submitted sworn and signed declarations from four individuals. The recollections contained in these declarations consist of events that purportedly commenced over

thirty years ago, a period of time over which the reliability of anyone's memory can reasonably be questioned.

In one of the sworn declarations, it is stated that the buoys marking the "City-designated swim area in front of the "Beach Club" have been placed regularly since 1959. However, the City indicated that the swim area was not designated until 1966. No explanation was given for this discrepancy. Each individual indicated that to the best of their knowledge, the buoys have been placed in the ocean every summer since 1966. While the Commission acknowledges that individual declarations are evidence that should be considered, in this particular case, given the significant public access issues posed by the development (as noted below), absent any other evidence such as aerial photographs of the buoys in the water during the summer months since 1966, the evidence of four individual declarations is not sufficient evidence that would enable the Commission to acknowledge a vested right for the placement of the buoys to mark off a much smaller swim area with the buoys than the designated public swim area and to only place the buoys over the portion of the designated public swim area in front of the private Beach Club.

Furthermore, the California Coastlines website (www.californiacoastline.org) has recently updated their inventory of photographs of the shoreline. According to Image #8701231 which was taken in June of 1987 just offshore of the subject site, it can be seen that no buoys are in the water. The Commission's Technical Services Mapping Unit has also reviewed this image and the site plan provided by the applicant indicating the location of the buoys in the water and has concurred that no buoys are visible in the water depicted in this 1987 image. As such, the City's claim that the buoys have been placed in the water consecutively every summer since 1966 is inaccurate.

North of the subject site is La Jolla Shores Beach. The public beach along La Jolla Shores is a heavily-used recreational area. In addition, the public boardwalk east of the shoreline is a public facility frequented by pedestrians, bicyclists, skaters, skateboarders, runners, and persons in wheelchairs. The walkway is accessible from the east/west streets off of El Paseo Grande, and provides access to the sandy beach at stairways located at various points along the seawall. With regard to the public beach, it extends north all the way to Black's Beach and south to a point just south of the restaurant, "The Marine Room" which is located just south of the La Jolla Beach and Tennis Club. Intermittent lateral public access is available dependent on the tide conditions.

The subject proposal to assert a claim of vested rights raises several concerns with regard to its impacts on public access opportunities along this shoreline. Notably, it is unclear why the buoys are placed in the ocean only seaward of the La Jolla Beach and Tennis Club, a small subset of the designated swim area. If the concern is truly a safety issue to keep boats, etc out of the swim area, why have the buoys not been placed along the boundary of the designated swim area adjacent to Avenida de la Playa where the boat launch is located? Although there is a public boat launch at the terminus of Avenida de la Playa, there is also a public swimming area immediately north of the boat launch seaward of La Jolla Shores. This is, in fact, one of the most popular and crowded beaches in San Diego County--a public beach which draws such large numbers of people –that the City is also currently proposing to construct a new lifeguard station in the near future to better serve the increasing population demands and recreational usage of this beach. In particular, the area immediately north of the boat launch is designated for swimming and boogie-boarding. The launching of boats and recreational watercraft in this area would be just as dangerous to the

swimmers in this area as to those to the south (seaward of the La Jolla Beach and Tennis Club) thus raising the question as to why buoys are not also proposed to be placed at this location as well.

That the buoys are only placed in the water adjacent to the La Jolla Beach and Tennis Club is problematic for several reasons. First, it gives the impression that the swim area is "private" and not open to the public when, in fact, the public has the constitutional right of public access to the ocean seaward of the mean high tide line. Secondly, the placement of the buoys does not coincide with the much larger designated public swimming area thus appearing to privatize only that one small area of the larger public swimming area. Thirdly, the placement of buoys hinders and interferes with the public's right to pass and repass along the beach seaward of the mean high tide line in front of the La Jolla Beach and Tennis Club as it appears to be cordoning off an area of the ocean (and beach) for private use as the buoys extend, at certain times, up and onto the beach. This creates a sense of "privacy" along the beach in this area, that is intended for public use. This sense of privacy is heightened by the existence of "trespassing not allowed" signage on the adjacent Beach Club structures. Due to their location on the beach, the statements "Private Property" and "Trespassing Not Allowed" on the signs affixed to the Beach Club's structures can be understood as declaring that the beach and area marked by the buoys is "Private Property" and that anyone swimming in this area is trespassing, in violation of the CA Penal Code. That is, in conjunction with the adjacent Beach Club signage, the apparent effect of the buoys demarcating only a smaller subset of the designated swim area in front of the private beach club is to convey the perception that the tidal area marked by the buoys is a private swim area. Such an effect is inconsistent with State law as neither the City or the Club has a right to preclude the public from swimming in these tidelands.[7]

The City does not expressly claim that it has a vested right to exclude the public from tidelands at this site. As discussed above in section D1, the City has no legal right to do so. The public has a right to use public tidelands that is protected by the California Constitution, statutes and caselaw and the City does not have a lease or authorization from the State to exclude the public from the public tidelands at this location. Since the City has not demonstrated that it was authorized by the State Lands Commission to exclude the public from the tidelands at the site, the Commission finds that the City has not established that it has a vested right for the placement of the buoys in the tidelands in front of the private beach club, especially since the apparent effect of only placing the buoys over the portion of the designated public swim area inform of the beach club is to convey the perception that the tidal area marked by the buoys is a private swim area.

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[7] Tidelands include "those lands lying between the lines of mean high tide and mean low tide which are covered and uncovered successively by the ebb and flow thereof." (*Lechuza Villas West v. CA Coastal Commission* (1997) 60 Cal.App.4th 218, 235). The State owns all tidelands and holds such lands in trust for the public. (*Id.; State of Cal. Ex rel. State Lands Com. V. Superior Court* (1995) 11 Cal.4th 50, 63; California Civil Code section 670). "The owners of land bordering on tidelands take to the ordinary high water mark. The high water mark is the mark made by the fixed plan of high tide where it touches the land; as the land along a body of water gradually builds up or erodes, the ordinary high water mark necessarily moves, and thus the mark or line of mean high tide, i.e., the legal boundary, also moves." (*Lechuza*, 60 Cal.App.4th at 235). In other words, the boundary between private property and public tidelands is an ambulatory line. (*Id*. at 242.)

Finally, even if the City did have a valid governmental authorization to place the buoys in the public tidelands, if the effect of the placement of the buoys is to privatize a public swim area which the City has no legal authority to do in the first instance, then the City cannot claim a vested right for such an activity. Any change in a project which would require an additional permit or other governmental approval under law in existence at the time of the change would certainly constitute a substantial change. That in itself would indicate that the changed project had not received all necessary governmental approvals and the claimant could therefore not have relied on any such non-existent approvals in commencing the changes to the project.

4. The City has not Invested Substantial Sums or Incurred Substantial Liabilities Through its Placement of Buoys, and it Would Endure No Significant Injustice from the Requirement to Obtain a Coastal Development Permit, Especially not in Comparison to the Potential Public Access Impact from Allowing its Activities to Continue Unregulated.

The City has indicated that the annual maintenance of the buoy markers includes replacement, as needed, of connection points on the buoy marker line, cleaning the ropes, and occasionally replacing worn-out buoy markers. The City has further stated that the annual cost for installation, removal, storage and maintenance of the buoy markers is approximately $6,000. However, the City has not provided any documentation to support this amount, such as invoices, work orders, etc. In fact, it is not clear if the City has incurred any expense relative to placement of the buoys as the City has indicated that it is the Club that places, maintains and stores the buoys when they are not being used. In any case, the City has indicated that the costs (man hours and actual expenditures for equipment) are incurred annually and, as such, are not considered to be an investment made in reliance on an authorization to continue the work into the future, much less to generate a profit at the end of the development. Furthermore, even if the annual work was designed towards some ultimate end, a $6,000 annual expenditure would not be a substantial investment. Therefore, the Commission finds that the City has not provided any evidence that it has invested a substantial sum of money or incurred substantial liabilities through the placement of buoys in the water year after year.

In addition, the City has not demonstrated how it would suffer any monetary injury if it were necessary to obtain permits for the placement of the buoys. Again, the buoys are stored, placed and maintained by the Club, acting as the City's agent. If the City or the Club were required to obtain permits for placement of the buoys, no significant monetary loss would be incurred. Thus, the City has demonstrated no detrimental reliance – the hallmark of estoppel – in this case. Finally, as discussed in previous sections of this report, given the significant public access concerns raised by the buoy placement, any monetary loss that were incurred by the City or the Club for necessary permits would be outweighed by the impacts to the environment and to public access if the placement of buoys in front of the private club were allowed to continue unregulated.

E. Conclusion

A vested right is limited to the actual extent or scope of the activity that was being lawfully conducted prior to the Coastal Act. The City has not provided sufficient evidence to establish that the buoys have been lawfully placed in the ocean since February 1, 1973, that the party placing them did so as an agent of the City, or that the buoys even were, in fact, placed in the claimed location every summer consecutively over that period of time. Finally, even if all of these facts were shown, they would not support a claim of detrimental reliance that would allowing such placement to continue unregulated, given the impacts to public access. For all the reasons set forth above, the Commission finds that the City has not met the burden of proving its claim of vested rights for development in the ocean seaward of the La Jolla Beach and Tennis Club. The Commission therefore finds that because the City has not met its burden of establishing that it has a vested right to place buoys in the ocean, the claim of vested rights for this use must be denied. This is not a determination of whether, ultimately, the current development at the site can be allowed. Rather, the decision to deny the claim of vested rights means only that no development is authorized until the claimant goes through the permitting process under the Coastal Act and is granted a CDP.

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